



September 22, 2016

ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte*, MB Docket Nos. 16-42; CS Docket No. 97-80

Dear Ms. Dortch:

TiVo Inc. (“TiVo”) hereby files this letter to add to the record in the above-captioned proceeding and address concerns that have been raised regarding the Commission’s legal authority to adopt regulations that promote a competitive market for retail navigation devices as required by Section 629.

TiVo agrees with the legal analysis presented in the record by Public Knowledge and Hauppauge regarding the Commission’s legal authority to enact rules to further the goals of retail competition in the market for video navigation devices.¹ Section 629 requires the Commission to “adopt regulations to *assure* the commercial availability . . . of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, *from manufacturers, retailers, and other vendors not affiliated with any [MVPD].*”² As Public Knowledge and TiVo have explained,³ Section 629 requires the Commission to enact the basic principle of *Carterfone* — one of the most successful communications policies in history — to the market for video devices used to access MVPD programming, giving consumers choice and enabling innovation in device design and features that rarely flows from large, incumbent network operators. Section 629 does not specify a specific manner to achieve these goals, but instead wisely leaves the implementation to the Commission as the expert agency in the field. Courts have on several

¹ Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 1-6, Section A (filed Sep. 20, 2016) (“PK Letter”); Letter from Robert S. Schwartz, Counsel to Hauppauge Computer Works, Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 4-8 (filed Sep. 22, 2016) (“Hauppauge Letter”).

² 47 U.S.C. § 549 (emphasis added).

³ PK Letter at 4-6; Comments of TiVo Inc., MB Docket No. 16-42, at 2-3 (filed Apr. 22, 2016).

occasions reviewed and approved the Commission's policies implementing Section 629, including the separable security requirement and the integration ban.⁴ In each case, the D.C. Circuit concluded that even though these specific policies themselves were not specified in the statute, the expert agency's determination as to how to achieve the goals set forth by Congress were entitled to deference under *Chevron*.

Based on TiVo's understanding of Chairman Wheeler's proposal as described in the fact sheet, nothing in the current proposal departs from this general scheme — Congress has set the goal of commercial availability of video navigation devices from unaffiliated manufacturers, retailers, and vendors, and the Commission, after considerable deliberation and after hearing from a wide variety of industry participants, is poised to vote on a proposal based almost entirely on a proposal set forth by the largest MVPDs (that is also the favored approach of programmers). The Commission has rightly concluded — and courts have agreed on this point⁵ — that in order to assure a viable retail market, some level of standardization is required so that manufacturers and retailers can sell devices that work across operators. Today, that standard is implemented via CableCARD, which is subject to a standard license between MVPDs and third-party devices known as the DFAST license. The DFAST license, in operation for more than a decade, is subject to Commission oversight to ensure that anticompetitive terms do not harm the market for retail navigation devices.⁶ Chairman Wheeler's proposal actually gives MVPDs greater flexibility than existing rules by permitting them to design their own apps, but rightly retains the requirement for a standard license between MVPDs and device makers in order to allow manufacturers to design products for a national market. As perhaps the most prominent competitive device maker in the market today, TiVo relies significantly on the common CableCARD standard and DFAST license, and would find it difficult if not impossible to develop and market retail devices if it were required to enter into separate, individually-negotiated licenses, with substantively different terms, with each MVPD.

As is the case today with the DFAST license, the proposal also would retain Commission oversight over the standard license to ensure that the license terms do not harm competition by, for example, favoring certain classes of devices, requiring third-party devices to favor MVPD content, or otherwise unreasonably limit competitive features that

⁴ *General Instrument Corporation v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *Comcast Corporation v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

⁵ *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 995 (D.C. Cir. 2013) ("Achieving this dual mandate [of Section 629(a) and 629(b)] demands technical standardization among MVPDs so that navigation devices can be marketed nationally while still proving capable of thwarting unauthorized access to service.").

⁶ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling, FCC 00-34 at ¶ 29 and n.71 (rel. Sept. 18, 2000).

consumers have come to rely on.⁷ Based on TiVo's understanding of the Chairman's proposal, all of these proposed requirements, as well as continued Commission oversight, fall clearly within the Commission's authority to assure a competitive retail market for video navigation devices.

TiVo also agrees with Public Knowledge's analysis as to why the Chairman's proposal is not in conflict with copyright law.⁸ As Public Knowledge explains, and as TiVo has previously explained, copyright law is simply not implicated by rules that merely permit consumers to access MVPD programming that they have paid for using devices of their choice.⁹ Recently, Professor Mark Lemley, a widely respected intellectual property professor who is among the most cited IP law scholars by the Supreme Court, explained why Chairman Wheeler's proposal does not run afoul or even implicate copyright law;¹⁰ a copy of Prof. Lemley's op-ed is attached for the record. In addition, sixteen law professors from around the country have also written to the Commission to support this analysis.¹¹

Please address any questions to the undersigned.

Respectfully submitted,

_____/s/_____

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⁷ Letter from John A. Howes, Jr., Computer & Communications Industry Association, to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 1-2 (filed Sep. 7, 2016).

⁸ PK Letter at 7-12, Section B.

⁹ *Id.*; Letter from Devendra T. Kumar, Counsel to TiVo Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 2-4 (Sep. 19, 2016).

¹⁰ Mark Lemley, *Don't Let Copyright Box Us In*, Sep. 21, 2016, at

<http://www.thehill.com/blogs/congress-blog/technology/297059-dont-let-copyright-box-us-in>.

¹¹ Letter from Annemarie Bridy et al. to Marlene H. Dortch, FCC, MB Docket No. 16-42 (filed Sep. 22, 2016).